

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Ariosto Zuniga and Lisette Gomez, h/w
and
Juraci Sobreira,

Plaintiff,

v.

O'Neill Properties Group, L.P., Hayes
Construction Company, C&A Construction
Company, Alum-A-Pole Corporation, and
PECO Energy Company,

Defendants,

v.

Mega Construction Company,
and

Ana L. Aguilar,

Additional Defendants.

Civil Action Number:

NOTICE OF REMOVAL

Ariosto Zuniga and Lisette Gomez, h/w
and
Juraci Sobreira,

Plaintiffs,

v.

Riverview Residential Partners, II, L.P.,
O'Neill Properties Group, L.P., Mega
Construction Corporation, PECO Energy
Company, Alum-A-Pole Corporation,
Hayes Construction Company, and C&A
Construction Company,

Defendants.

NOTICE OF REMOVAL

Defendants Riverview Residential Partners, II, L.P., O'Neill Properties Group, L.P., Mega Construction Corporation of New Jersey, Inc., PECO Energy Company, Alum-A-Pole Corporation, Hayes Construction Company, and C&A Construction Company, by and through their undersigned counsel where noted, file this notice of removal under 28 U.S.C. §1446(a). As grounds for removal, Defendants respectfully represent as follows:

Introduction

1. Plaintiffs are Ariosto Zuniga, an individual purported to be his wife Lisette Gomez, and Juraci Sobreira.

2. On May 29, 2009, Plaintiffs sued O'Neill Properties Group, L.P., PECO Energy Company, Alum-A-Pole Corporation, Hayes Construction Company, and C&A Construction Company for negligence, products liability, and loss of consortium—alleging Mr. Zuniga and Mr. Sobreira were injured, at a construction worksite located in Montgomery County, Pennsylvania, when scaffolding both men were constructing came into contact with an overhead electrical wire, causing both men to suffer electrical shock and burns—in the Pennsylvania Court of Common Pleas, Philadelphia County, May Term 2009, Docket Number 04280 (“May Term 2009 Matter”).

3. On August 24, 2009, Defendant C&A Construction filed a Praecipe to Issue Writ to Join Additional Defendant Ana L. Aguilar in the May Term 2009 Matter. On September 14, 2009, Defendant C&A filed its Joinder Complaint for indemnification against Additional Defendant Ana L. Aguilar, with personal service effectuated October 10, 2009.

4. On November 17, 2009, Defendant Hayes Construction Company filed a Joinder Complaint against Defendant Mega Construction Corporation for indemnification in May Term 2009 Matter.

5. On September 2, 2009, Plaintiffs filed a second suit against Defendant Mega Construction, Riverview Residential Partners, II, L.P., O'Neill Properties Group, L.P., PECO Energy Company, Alum-A-Pole Corporation, Hayes Construction Company, C&A Construction Company for negligence, products liability, and loss of consortium—arising out of the same construction accident—in the Pennsylvania Court of Common Pleas, Philadelphia County, September Term 2009, Docket Number 03596 (“September Term 2009 Matter”).

6. Both the May Term 2009 Matter and the September Term 2009 Matter state the same set of claims. The only difference between the two matters is that the September Term 2009 Matter names Defendant Riverview Residential Partners as a Defendant, Defendant Mega Construction Company as a Defendant instead of an Additional Defendant, and does not include Ana L. Aguilar as an Additional Defendant.

7. On January 26, 2010, both the May Term 2009 Matter and the September Term 2009 Matter became removable when Plaintiffs disclosed, in Responses to Interrogatories and Requests for Production of Documents served by Defendant C&A Construction Company, that Plaintiff Zuniga is a citizen of Costa Rica and Plaintiff Sobreira is a citizen of Brazil, providing this court with original diversity jurisdiction under 28 U.S.C.S. §1332(a)(2). (Exhibit A).

8. On January 6, 2010, through their submission of a Case Management Conference Memorandum, in the May Term 2009 Matter, Plaintiffs made a demand of \$25,500,000.00 (twenty five million, five hundred thousand dollars) in settlement of their claims. (Exhibit B).

9. The Response to Request for Production of Documents also included the Internal Revenue Service W-2 forms and Form 1040 U.S. Individual Income Tax Returns for years 2003-2008 of Plaintiff Gomez. All the W-2 forms indicate Plaintiff Gomez’s taxable marital status as “single.” The Form 1040 returns allegedly list Plaintiff Zuniga as a spouse for years 2003-2006.

While Plaintiff Zuniga appears as a spouse in the 2007 Form 1040, he is also listed as a “homemaker” with no income in contradiction to his averments in the present lawsuits that he was employed as a construction worker, furthermore the 2007 Form 1040 is unsigned. The 2008 Form 1040 does not mention Plaintiff Zuniga at all and does not indicate a married filing jointly status. (Exhibit C).

10. Defendants file this notice of removal within 30 (thirty) days of receipt of the Plaintiff’s January 26, 2010, Responses to Interrogatories and Requests for Production of Documents served by Defendant C&A Construction Company.

Basis for Removal

11. Removal is proper because this Court has alienage jurisdiction. 28 U.S.C. §1332(a)(2). Specifically Plaintiff Zuniga is a citizen and subject of Costa Rica while Plaintiff Sobreira is a citizen and subject of Brazil, and all the real parties are diverse.

12. Plaintiff Gomez’s consortium claim was included in a fraudulent attempt to defeat diversity. The discovery documents as provided to Defendants indicate the lack of a valid marriage between Plaintiffs Zuniga and Gomez. Under Pennsylvania law, the nonexistence of marriage precludes the cause of action for loss of consortium. Cleveland v. Johns-Manville Corp., 547 Pa. 402, 408 (Pa. 1997); Sprague v. Kaplan, 392 Pa. Super. 257, 258 (Pa. Super. Ct. 1990).

13. The amount in controversy exceeds \$75,000.00, excluding interest, costs, and attorney fees. 28 U.S.C. §1332(a).

14. Plaintiffs cannot bring a cause of action against Third-Party Defendant Ana L. Aguilar because, as averred by Plaintiffs in their Complaints she was their employer, thus any

claims against her are restricted by the exclusivity provision of the Pennsylvania Workers' Compensation Act ("WCA"), 77 P.S. §§ 1-1603 (1992 & Supp. 1995).

15. Third-Party Defendant Ana L. Aguilar as a Third-Party Defendant cannot move this Court for removal. Abington Mem. Hosp. v. Diviney, 2008 U.S. Dist. LEXIS 47339 (E.D. Pa. June 16, 2008) ("ability of a third-party defendant to remove a case from state to federal court remains in doubt"). In addition, her consent to removal is not required as there is no possibility that Plaintiffs would be able to establish a cause of action against their former employer in state court given the exclusivity provision of WCA. Thus she not included among the undersigned as her consent is not required. Ashley v. Conn. Gen. Life Ins. Co., 2003 U.S. Dist. LEXIS 9853 (N.D. Ill. June 10, 2003) (denying remand stating that consent of a third-party defendant is not required for removal by actual defendants in a case); Bradley v. MD. Cas. Co., 382 F.2d 415, 419 (8th Cir. 1967) (consent to removal by a third party-defendant brought into the suit only by a third-party plaintiff not required).

16. All other defendants who have been served with summons consent to the removal of this case to federal court. Balazik v. County of Dauphin, 44 F.3d 209, 213 (3d Cir. 1995); see 28 U.S.C.S. § 1446(a).

17. All pleadings, process, orders, and other filing in the state court action are attached to this notice as required by 28 U.S.C. §1446(a). (Exhibit D).

18. Venue is proper in this district under 28 U.S.C. §1441(a) because the state court where the action has been pending is located in this district.

19. Defendants will promptly file a copy of this notice of removal with the clerk of the Pennsylvania Court of Common Pleas, Philadelphia County and serve same upon counsel for Plaintiffs.

Jury Demand

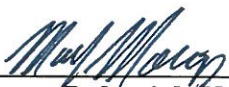
20. Plaintiffs made a jury demand in both the May Term 2009 Matter and the September Term 2009 Matter.

Conclusion

21. For these reasons, Defendants ask the Court to remove these actions to this federal court.

WHEREFORE, Defendants, Riverview Residential Partners, II, L.P., O'Neill Properties Group, L.P., Mega Construction Corporation, PECO Energy Company, Alum-A-Pole Corporation, Hayes Construction Company, and C&A Construction Company, request that the above-captioned matters, now pending in the Pennsylvania Court of Common Pleas, Philadelphia County, May Term 2009, Docket Number 04280 and September Term 2009, Docket Number 03596, be removed to the United States District Court for the Eastern District of Pennsylvania.

Respectfully submitted,


Kaufman Dolowich Voluck & Gonzo, LLP
By: Anne R. Myers, Esquire
Maria J. Morinigo, Esquire
Attorneys for Defendant Mega Construction Corporation
Dated: **24 FEB/10**

Thomas Thomas & Hafer, LLP
By: Monica E. O'Neill, Esquire
Lauren R. Clein, Esquire
Attorneys for Defendant Hayes Construction Company, Defendant Riverview Residential Partners, II, LLP, and Defendant O'Neill Properties Group, L.P.
Dated:

Campbell Campbell Edwards & Conroy
By: C. Scott Toomey, Esquire
William J. Conroy, Esquire
Attorneys for Defendant PECO Energy Company
Dated:

Swartz Campbell, LLC
By: Frederick C. Fletcher, II, Esquire
Attorneys for Defendant C&A Construction Company
Dated:

Jury Demand

20. Plaintiffs made a jury demand in both the May Term 2009 Matter and the September Term 2009 Matter.

Conclusion

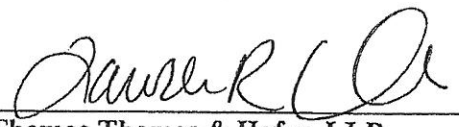
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William J. Conroy, Esquire
Attorneys for Defendant PECO Energy Company
Dated:



Thomas Thomas & Hafer, LLP
By: Monica E. O'Neill, Esquire
Lauren R. Clein, Esquire
Attorneys for Defendant Hayes Construction Company, Defendant Riverview Residential Partners, II, LLP, and Defendant O'Neill Properties Group, L.P.
Dated: 2/24/10

Swartz Campbell, LLC
By: Frederick C. Fletcher, II, Esquire
Attorneys for Defendant C&A Construction Company
Dated:

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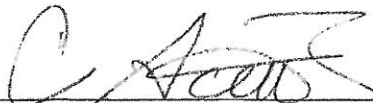
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Maria J. Morinigo, Esquire
Attorneys for Defendant Mega Construction Company
Dated:



Campbell Campbell Edwards & Conroy
By: C. Scott Toomey, Esquire
William J. Conroy, Esquire
Attorneys for Defendant PECO Energy Company
Dated: 2-25-10

Thomas Thomas & Hafer, LLP

By: Monica E. O'Neill, Esquire
Lauren R. Klein, Esquire
Attorneys for Defendant Hayes Construction Company, Defendant Riverview Residential Partners, II, LLP, and Defendant O'Neill Properties Group, L.P.
Dated:

Swartz Campbell, LLC

By: Frederick C. Fletcher, II, Esquire
Attorneys for Defendant C&A Construction Company
Dated:

Jury Demand

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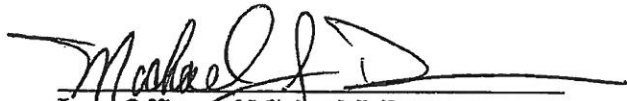
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Lauren R. Clein, Esquire
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Dated:


Swartz Campbell, LLC
By: Frederick C. Fletcher, II, Esquire
Attorneys for Defendant C&A Construction Company
Dated:

A handwritten signature in black ink, appearing to read "Michael J. Dunn", is written over a horizontal line.

Law Offices of Michael J. Dunn

By: Michael J. Dunn Esquire

*Attorneys for Defendant Alum-A-Pole
Corporation*

Dated:

ND: 4836-6089-8053, v. I

CERTIFICATE OF SERVICE

I, Maria Jose Morinigo, hereby certify that on February 25, 2010, a true and correct copy of the attached Notice of Removal was served on all the following counsel of record and unrepresented parties by first-class mail, postage prepaid:

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KAUFMAN DOLOWICH VOLUCK & GONZO, LLP

By:



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